博士学位論文審査報告書
Summary of Doctoral Thesis and Report of Examination

研究科長　殿
下記のとおり、審査結果を報告します。
To the Dean:
We report the result of Examination for the Doctoral Thesis below.

学籍番号 Student I.D. No.: 4007 S313 -

学生氏名 Name: PAPANASTASIOU, Thomas Nektarios

和文題名 Title in Japanese: 政治的リスクに対する海外投資の保護：アジア諸国の電力部門における日本の投資のケース

英文題名 Title in English: The Legal Protection of Foreign Investments against Political Risk: The Case of Japanese Investments in the Power Sector of Asian Countries

1. 口述試験参加教員　Faculty Members Involved in Oral Examination

①審査委員会主査　Chief Referee of the Screening Committee

氏名 Name: 浦田秀次郎 印
所属 Affiliated Institution: 大学院アジア太平洋研究科
資格 Status: 教授
博士学位名・取得大学名: Ph.D. Title Earned·Name of Institution
Ph.D（経済学）スタンフォード大学

②副査（審査委員 1）Deputy Advisor (Member of Screening Committee 1)

氏名 Name: 松岡俊二 印
所属 Affiliated Institution: 大学院アジア太平洋研究科
資格 Status: 教授
博士学位名・取得大学名: Ph.D. Title Earned·Name of Institution
博士（学術）広島大学

③審査委員 2　Member of Screening Committee 2

氏名 Name: 阿部義章 印
所属 Affiliated Institution: 早稲田大学
資格 Status: 名誉教授
博士学位名・取得大学名: Ph.D. Title Earned·Name of Institution
Ph.D（経済学）コーネル大学

④審査委員 3　Member of Screening Committee 3

氏名 Name: 中川淳司 印
所属 Affiliated Institution: 東京大学社会科学研究所
資格 Status: 教授
博士学位名・取得大学名: Ph.D. Title Earned·Name of Institution
博士（法学）東京大学

2. 開催日時 Date / Time: (Y)2011 /(M) 12 /(D) 5 (Time) 10:00Period時限 ～12:00Period時限
[時限 / Period] 1st: 9:00-10:30, 2nd: 10:40-12:10, 3rd: 13:00-14:30, 4th: 14:45-16:15, 5th: 16:30-18:00, 6th: 18:15-19:45, 7th: 20:00-21:30
3. 会場 Venue: 19-315
4. 合否判定 Result: ○合/Passed・否/Failed（該当する方に○ Circle as appropriate）
5. 添付資料 Attached document(s)
10 枚 pages（和文4，000字程度、もしくは英文1,500語程度。ただし、論文題目のみは、和文・英文を併記すること）
(Approximately 4,000 characters in Japanese, or 1,500 words in English. The Doctoral Thesis title, however, must be written in both Japanese and English.)

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Report on the Evaluation of a Submitted Ph.D Dissertation

Name: Thomas Nektarios Papanastasiou

Title of Dissertation: The Legal Protection of Foreign Investments against Political Risk:The Case of Japanese Investments in the Power Sector of Asian Countries

邦語タイトル：政治的リスクに対する海外投資の保護：アジア諸国の電力部門における日本の投資のケース

I. Overview of the dissertation

This study examines the ways how political risks associated with foreign direct investment in the power sector are managed or dealt with. Political risk is defined as the host government's unwarranted interference with the foreign investment, an interference which should be political in nature and should cause damage to the investment's economic interests. Expropriation is the most traditional type of political risk. The analysis focuses on two frameworks for dealing with political risks, namely, public international laws (PILs) such as international investment treaties and economic partnership agreements (EPAs) and contractual arrangements (mainly political risk insurance (PRI)-policies, and investor-state guarantees). For the analysis, this study selects five Asian countries as host states of power investments and Japan as the home country.

In connection with international investment treaties, this study examines both general and specific standards of treatment against political risks. As for political risk management through contracts, this study assesses the available legal means through PRI policy-tools provided by third-party actors such as Nippon Export and Investment Insurance (NEXI) and Multilateral Investment Guarantee Agency (MIGA) and investor-state contracts.

The study adopted both qualitative and quantitative methods for the two types of frameworks for the analysis of managing political risks. The qualitative method applied to international investment treaties involves an analysis of recent EPAs (2006-2009) entered into force between Japan and five countries (Indonesia, Malaysia, Philippines, Thailand and Vietnam) and an examination of the wording of eleven standards of treatment along with the legal interpretation of secondary sources. The qualitative approach to PRI mechanisms is conducted using primary information obtained from the interviews and meetings with NEXI and Japan Bank for International Cooperation (JBIC) executives as well as information contained in their annual reports, organisation laws and secondary studies. As for power contracts, the analysis is based

mainly on primary data contained in five real-world power projects implemented by Japanese companies in Asian countries. Turning to the quantitative methodology, an analysis of international investment treaties develops non-binary measures (a scoring card) to provide several snapshots of key legal elements for the protection of power investments in each of the five Asian countries, based on the investment and service trade chapters as well as on the treaties' appendices. As to the analysis of the contracts, it undertakes a non-numerical evaluation of critical elements analysed in the power contracts, based on a five-scale index referring to the reservations or exceptions included in each case.

This dissertation found that the multi-tier legal framework can be effective in protecting against political risk, but such effectiveness depends on the wording of the legal components and on the nexuses among them. In particular, this analysis demonstrates that several factors – reservations in EPA clauses, lack of clarity in PRI tools and non-comprehensiveness in contractual guarantees – may weaken the protection against political risk. Finally, even if PRI (provided by NEXI) still plays the most dominant role in the protection of Japanese investments, this dissertation asserts that the nexus of an institutionalised legal framework would be preferable in addressing future challenges of political risk mitigation.

II. Contents of the dissertation

Table of Contents

Chapter 1 introduces the issue to be analyzed in the dissertation, i.e., managing political risks in foreign investment in the power sector (electricity). This study deals with the issue from the point of view of legal analysis. Specifically, the dissertation analyzes how political risk can be legally managed and it assesses the effectiveness of the legal responses to political risk.

Chapter 2 presents detailed discussions on the issues analyzed and the methodologies applied in the analysis. Specifically, the three main areas of dissertation-discussion are explored in this chapter. Firstly, before determining the notion of political risks, the present dissertation describes the categories of risks that exist when investing in the infrastructure sectors. It distinguishes commercial from political risks as those that usually exist when doing business such as project risks or economic risks. Following the discussion of political risk determination, the majority of studies agree that the distinction between commercial and non-commercial risks is blurred mainly because of the evolving form of contractual agreements between investors and countries in investments related to infrastructure sectors. This dissertation, after examining the definitions given by previous studies, broadly conceives the notion of political risk as the host government's unwarranted interference with the foreign investment, an interference which should be political in nature and should cause damage to the investment's economic interests. Thus, the classification of political risk cannot be comprehensive unless the reason behind the state's unwarranted behaviour is investigated (relationship among damage, breach and the reason that triggered the breach is required).

Secondly, this study focuses on identifying the legal framework that is available to foreign investors in order to manage political risks. Previous studies have focused on a traditional and non-integrated approach to political risk mitigation by analysing methods that require only an affirmative action by investors, such as arrangements with export credit agencies (ECAs) and multilateral banks or negotiation of sovereign guarantees with host-states.

Thirdly, this dissertation follows a combined analytical method consisting of qualitative assessment and scoring evaluation. The qualitative assessment is based on the analysis of the comprehensiveness of legal countermeasures to political risks, examining the broadness and clarity of wording, the inclusiveness of content with regards to the existence or lack of a reference to particular elements and the number of exceptions made in the relevant clauses or policies. Part I of the dissertation consists of an analysis of recent EPAs (2006-2009) and one bilateral investment treaty (BIT) entered into force between Japan and the five Asian countries. It examines the wording

of eleven standards of treatment along with the legal interpretation of secondary sources as well as of international tribunals' jurisprudence. As per Part II, the qualitative approach to PRI mechanisms and policies is based on primary information obtained from interviews and meetings with NEXI and JBIC executives, as well as on information contained on annual reports, organisation laws and secondary studies about Japan's and World Bank (WB)'s agencies. In relation to power contracts, the methodology is based on primary data contained in five real-world power projects implemented by Japanese companies in the respective Asian countries.

Part I of the dissertation consists of three chapters. Chapter 3 examines the standards of treatment responsible for the protection against expropriation and the risk of non compensation for the damages suffered by foreign investors. These two risks are the most traditional types of political risks. This study analyses what constitutes direct and indirect expropriation, lawful and illegal expropriation, and examines what international arbitration tribunals require in order to accept a claim of expropriation and to award compensation. Most importantly, this chapter examines the conditions that make a taking non-compensable. Such conditions are determined according to the distinction between general regulatory takings that are permissible and those that are not permissible, requiring compensation to the affected investor. In relation to the nature of regulatory measures and their distinction from expropriation-measures, a number of tests and doctrines of expropriation are investigated. However, such distinction is not an easy exercise when the host country issues taxation measures that result in a substantial interference with the property of foreign investments. According to the scoring results, it is found that some of Japan's treaties exclude the application of substantive principles from taxation measures, resulting possibly in uncertainty. Such treaties are conceived as being less effective in the protection against expropriation, leading to low scores. However, in relation to compensation standards, most treaties receive high scores due to the clear reference to full compensation rights according to Hull's formula.

Chapter 4 assesses the role of general standards of treatment, namely national treatment (NT), most favoured-nation treatment (MFN), fair and equitable treatment (FET) and full protection and security (FPS), in the protection of Japanese power-investments against political risk. It argues that clauses containing general standards have not received appropriate attention as a tool for protecting foreign investments. NT and MFN protect against the risk of discrimination and they are relative standards meaning that they require the same treatment as that domestic or third-countries' investors receive. FET and FPS protect against any arbitrary or unfair host government's behaviour, as well as against the risk of civil disturbance, violence

and strife. They are considered to be absolute standards as they do not require any comparison between the treatment that Japanese investors receive and the treatment provided to other investors. Especially in relation to power investments, the general standards of treatment are indispensable due to the dominance of state owned enterprises within the electricity sector of most countries. However, assessing the effectiveness of general standards in the examined Japan's Treaties, it is found that almost all of them obtain exclusions and limitations. In relation to NT and MFN standards, low scores are given for those treaties that exclude general provisions such as subsidies and other incentives from the rule of non-discrimination between Japanese and other investors. Even lower scores are given when treaties exclude the general standards from applying to investments that are specifically related to power sector. In relation to FET and FPS standards, when treaties include an additional note, which prescribes the minimum standard of treatment to be afforded to Japanese investments, it is considered to be a substantive limitation to these standards' protection-capacity, resulting in lower scores of effectiveness.

Apart from the general standards, Chapter 5 assesses the role of specific standards of treatment in mitigating political risk, such as free transfer of funds (FTFs), protection from strife and an umbrella clause. It also examines the treaties' deterrence through the provision of investor-state arbitration and subrogation clauses. These standards address the protection of investments against specific dangers: prohibition on capital repatriation, no remedy for damages due to civil disturbance or violence, breach of contracts, difficulty in enforcing legal orders or absence of an impartial judicial forum and the non recognition of the home-country's substitution rights. FTFs and protection from strife are not absolute standards. The host states are allowed to limit their application. However, any restriction on these standards shall be legitimate (permitted under specific conditions) and follow concrete legal principles such as non-discriminatory treatment (NT and MFN) that shall be compelled. According to the dissertation assessment, it is found that only a few treaties refer explicitly to the above principles, when legitimate restrictions occur, and some of them impose excess (non-legitimate) restrictions, resulting in a lower score on the effectiveness of their protection-degree. With regards to the umbrella clause, almost all treaties receive the lowest score due to the absence of such clause in their investment-chapters. Finally, with respect to the investor-state arbitration clause, all Japan's Treaties include such clause, with several exceptions and different wordings. In particular, two of them exclude from the arbitration right disputes that arise on certain issues, such as on breach of NT or disputes that arose prior to the entry into force of the respective treaty.

Part II of the dissertation consists of two chapters. Chapter 6 assesses the available legal means in PRI policy-tools provided by Japanese state-agencies, such as NEXI and JBIC and by multilateral actors, such as WB agencies, mainly MIGA. In theory, PRI agencies are known as the *prominent victims* because of their involvement in deterring the harmful behaviour of host governments and in indemnifying the investors for the damage suffered. According to this chapter's analysis, it is found that NEXI has played a crucial role not only in protecting Japanese power-investments against several political risks, but also in promoting the economic and industrial interests of Japanese enterprises against other countries' competitors. However, this chapter highlights that there are some implications in NEXI's insurance-tools and MIGA's guarantees, which are related to the ascertainment of investors' claims. It is found that signing a PRI contract does not constitute an automatic elimination of all possible cases of political risk. Some risks are not covered by PRI tools and others are not clearly addressed. There are technicalities such as a list of insured events that shall occur and a number of unclear check-points required by ECAs in order to decide whether an insurance-claim is valid or not. The vagueness of such technicalities leads to limitations in addressing some political risks, especially expropriation or infringement of rights and the change in laws risk.

In addition, along with the PRI measures, Chapter 7 analyses the role of specific guarantees included in investor-state contracts. It selects the arbitration, stabilization, waiver of sovereign immunity and force majeure clauses as the most essential in mitigating political risk. It asserts that such guarantees are preferable compared to the sovereign guarantees mainly because they do not impose contingent liabilities on host-countries' fiscal budget, as was evidenced during financial crises. Even if NEXI is still looking for sovereign guarantees, they are not anymore an option. Today, there is a need for signing contracts that on the one hand, do not impose heavy contingent liabilities and on the other hand, offer a good design in managing political risk. Assessing the design of the four mentioned guarantees, this chapter evaluates the contracts based on the inclusion of specific legal elements in each clause, as well as on the comprehensiveness of their wording. It is found that some contracts contain a best-design clause of political risk management, while unsatisfactory design exists in several others. Almost all contracts provide an arbitration clause without choice-of-law other than the domestic law; only two contracts obtain a comprehensive sovereignty clause, guaranteeing that they irrevocably waive the host state's immunity over jurisdiction of a foreign award, the enforcement and the attachment of its assets. Moreover, only one contract provides a separate clause on the stability-of-laws

guarantee, while others contain no stabilisation clause. In addition, even if all contracts provide a force majeure clause, their risk-transfer design between private and public parties varies significantly, resulting in several uncertainties.

Chapter 8 examines the effectiveness of the three legal-tiers when they function in pairs and all together. Four potential combinations are made: [*PIL + PRI*], [*PIL + Contracts*], [*PRI + Contracts*] and [*PIL + PRI + Contracts*]. This chapter compares such combinations of legal regimes by looking into two types of interactions. Firstly it analyses the interface (overlapping) of political risk that can be mutually covered. Secondly, when no overlapping exists, it examines whether there is a nexus, meaning a complementary result of mechanisms that uniquely exist in each legal regime. It is found that there is an overlapping of several types of political risk that can be covered under each combination of legal regimes. The most important finding is that the legal mechanisms that exist only in one regime can also complement the others' regimes framework. Therefore, they can enhance the degree of legal protection against political risk when bound together. In particular, synthesising the core argument of such complementary roles, PIL regime is unique for its preventive nature of measures (*ex-ante protection*) and for its broader coverage of political risk due to the inclusion of general standards of treatment. PRI is unique for offering measures of deterrence (*ex-post protection*) that can address on-time specific types of political risk better than any other regime (e.g. natural events-force majeure). Finally, investor-state contracts are unique for their specific-preventive nature (*tailor-made protection*) offering an independent structure of risk-transfer design, according to the needs and priorities of the parties. However, such nexus constitutes an ideal situation occurring in nominal terms, and it does not take into consideration the variations that exist under each regime. In reality, as assessed by this dissertation, due to several limitations or weaknesses in each legal regime, the actual nexus is more limited than the nominal case described above.

In conclusion, Chapter 9 summarises the strengths and the weaknesses in each of the Japan's treaties, in the NEXI and the MIGA insurance policies and in each of the five investor-state contracts that have been analysed throughout the dissertation. This study has found that the multi-tier legal framework can be effective in protecting against political risk, but such effectiveness depends on the wording of the legal components and on the nexuses among them. In particular, this analysis demonstrates that several factors – limitations in EPA clauses, lack of clarity in PRI tools and non-comprehensiveness in contractual guarantees – may weaken the protection against political risk. Even if PRI (provided by NEXI) still plays the most dominant role in the protection of Japanese investments, this dissertation proposes that the nexus of an

institutionalised legal framework would be the most preferable in addressing future challenges of political risk mitigation. It implies that Japan needs to expand the number of EPA treaties with other nations, to take a more balanced-approach between informal (negotiations) and formal legal institutions (litigious-means) and to implement its own Model EPA, as is the case for other capital-exporting countries. As for the Japanese businesses, they need to depoliticize their disputes with host-states through the direct-right to investor-state arbitration, reducing their dependence on Japan's politics. Finally, this study has made three contributions to the legal literature of investment protection: the determination of political risk under new areas of law (PIL); the structure of a comprehensive framework composed of multi-legal regimes in a separate and in a nexus manner; and the assessment of the framework's effectiveness by using qualitative and scoring methodology.

III. Evaluation

The power (electricity) sector plays a very important role in achieving economic growth in both developed and developing countries. This is particularly so for developing countries, where a shortage in the supply of electricity precludes not only the producers from fully utilizing productive capacities but also the households from living a decent life. Although policy makers realize the need to increase electricity generation, expansion of the power sector is not easy as it faces a number of problems. One of the most serious problems is the lack of financial resources on the part of developing countries, because construction of electricity generation facilities entails a large sum of money. As such, many power sector projects in developing countries are financed by foreign sources including international development agencies such as the World Bank, foreign governments, and foreign companies. In recent years, public and private partnership (PPP) has become a popular form of investment in the power sector mainly because of risk-sharing and utilization of accumulated experiences in building and managing the projects by the private sector.

This dissertation examines the issues related to political risks associated with the investment in the power sector in developing countries from the legal perspective. This study adopts basically two approaches. One is examination of the texts of the treaties concerning investment and the other is assessment of the clauses regarding the political risks in the actual contracts. Among many interesting findings, this study reveals the following two main observations. First, political risk can be effectively managed through two legal tiers of protection: public international law and guarantees. Second, there is a nexus among different tiers of the legal framework, which has a

complementary impact on the mitigation of political risk.

The dissertation contributes substantially to the literature on political risks of foreign investment in infrastructure, whose importance has been growing in recent years as the number of foreign investments in infrastructure such as electricity generation has been increasing rapidly. The previous studies on this subject have taken a rather narrow approach by focusing on one aspect of political risk. Unlike these previous studies, this dissertation adopted a holistic approach towards political risk management. Specifically, in comparison with the previous studies, the present study is different in the following respects. This study adopted a multi-tier legal framework by using different types of assessment techniques and by exploring the role of the following legal regimes: public international law consisting of international investment treaties such as EPAs, political risk insurance (PRI) provided by export credit agencies (ECAs) and contractual guarantees included in investor-state contracts.

Another important contribution is the adaptation of the scoring method in the analysis of the legal framework. The scoring techniques have been used in the discipline of international economics such as in the studies measuring the impediments of host countries' FDI and EPA laws. However, the present dissertation is different than previous studies on many aspects. Most importantly, it focuses on the relation of legal measures with the issue of political risk mitigation and not on the aspect of investment liberalization or protection in general. Moreover, this study uses legal interpretative tools for the analysis of the key legal elements. It develops non-binary measures (a scoring card) to provide several snapshots of the legal elements for the protection of power investments. Such elements are extracted from the investment and trade-in-services chapters in the EPAs as well as from the treaties' appendices. This approach is very effective in making comparisons between different laws and treaties.

Having discussed a number of important contributions made by the dissertation, we, the evaluators, identified several issues that should be pursued in the future. First, the number of cases for the analysis should be expanded to draw more general observations. A number of extensions can be considered. First, the sector coverage can be extended to include sectors other than the power sector such as transportation sector. Second, country coverage can be extended in at least two different ways, FDI home and host countries. This study investigates the cases where Japan is the only home country. It would be interesting to compare the ways political risks are dealt with by other home countries such as the United States and European countries. As to the host countries, this study examines the cases for East Asian countries. It may be worth comparing with developing countries in other regions or developed countries. These comparisons, which

may reveal interesting and important differences or similarities, should contribute to deeper understanding of the issues.

Discussions on the issues from three approaches, that is, public international law, political risk insurance, and contractual guarantees, are unique and very important contributions. However, these discussions are rather independent and their relations are not explicitly considered. A further analysis, which analyzes the interaction of these three perspectives, should prove very useful in understanding the entire nature of the problem.

IV. Decision of the Committee

Considering the results of careful assessment of the submitted dissertation, which is presented in section III of this report, the oral presentation of the dissertation and subsequent discussions, which was held on December 5, 2011, the Committee members came to a unanimous decision that Thomas Nektarios Papanastasiou, the author of the submitted dissertation, should be granted a Ph.D.

January 6, 2012
2012 年 1 月 6 日
Evaluation Committee
審査委員会
Main Examiner: Shujiro Urata Ph.D (Stanford University)
Professor, GSAPS, Waseda University
主査　　早稲田大学大学院アジア太平洋研究科・教授
浦田秀次郎　Ph.D.　スタンフォード大学
Deputy Examiner: Shunji Matsuoka Ph.D (Hiroshima University)
Professor, GSAPS, Waseda University
副査　　早稲田大学大学院アジア太平洋研究科・教授
松岡俊二　　博士　広島大学
Examiner: Yoshiaki Abe Ph.D (Cornell University)
Emeritus Professor, Waseda University
審査委員　早稲田大学・名誉教授
阿部義章　　Ph.D　コーネル大学
Examiner: Junji Nakagawa Ph.D (Tokyo University)
Professor, Institute of Social Science, Tokyo University
審査委員　東京大学社会科学研究所・教授
中川淳司　　博士　東京大学